

PETROLEUM MARKETERS  
ASSOCIATION OF AMERICA, et al.,

Plaintiff,  
v.

MICHAEL O. LEAVITT and  
UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY,  
Defendants.

No. 1:02CV02249 PLF

### SETTLEMENT AGREEMENT

WHEREAS, plaintiff Petroleum Marketers Association of America, et al. ("PMAA")  
filed the following action in the United States District Court for the District of Columbia:

Petroleum Marketers Association of America, et al. v. Michael O. Leavitt and United States  
Environmental Protection Agency, Civil Action No. 02-02249<sup>1/</sup>;

WHEREAS, those actions challenge the promulgation by the United States  
Environmental Protection Agency ("EPA") of a final rule under section 311 of the Clean Water  
Act, 33 U.S.C. § 1321, entitled "Oil Pollution Prevention and Response; Non-Transportation-  
Related Onshore and Offshore Facilities," and published in the Federal Register at 67 Fed. Reg.  
47042 (July 17, 2002) (the "SPCC Rule" or "Rule");

WHEREAS, EPA intends to take certain actions as set forth more fully below;

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<sup>1/</sup>This case was consolidated by order of the Court with American Petroleum Institute v. Michael  
O. Leavitt and United States Environmental Protection Agency, Civil Action No. 02-02247, and  
Marathon Oil Company v. United States Environmental Protection Agency, Civil Action No. 02-  
02254. Those actions are the subject of a separate partial settlement agreement.

WHEREAS, EPA and the Plaintiff (collectively, "the Parties") wish to implement this Settlement Agreement ("Agreement") to avoid protracted and costly litigation and to preserve judicial resources;

NOW THEREFORE, the Parties, intending to be bound by this Agreement, hereby stipulate and agree as follows:

1. Within five days of the date that the Parties execute this Agreement, the Parties shall file a joint motion in Case No. 02-02249 in the United States District Court for the District of Columbia that notifies the Court that the Parties have reached a final, written Agreement that may resolve this case, and that requests that the stay in this case be continued and all activity be suspended pending implementation of this Agreement.

2. Attachments A and B represent EPA's position on the matters addressed. EPA intends (a) to issue as soon as reasonably practicable a letter from the Assistant Administrator for the Office of Solid Waste and Emergency Response to PMAA of substantially the same substance as set forth in Attachment A of this Agreement; (b) to publish in the Federal Register a notice of the availability of that letter; and (c) to publish as soon as reasonably practicable a notice in the Federal Register containing the language set forth in Attachment B.

3. After EPA takes the actions identified in ¶ 2, then the Parties shall promptly file either (a) a joint motion for dismissal with prejudice of Case No. 02-02249 in accordance with Rule 41(a)(2) of the Federal Rules of Civil Procedure or (b) if intervening and other parties agree, a stipulation of dismissal with prejudice in accordance with Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure.

4. EPA intends to take the actions identified in ¶ 2 as soon as reasonably practicable.

If EPA fails to take such actions as soon as reasonably practicable, then Plaintiff's sole remedy under this Agreement regarding the Rule under review in these cases shall be the right to request that the Court lift the stay of proceedings and establish a schedule for further proceedings as to those claims. If such a motion is filed and litigation of those claims is reinstated by the Court, no provision of this Agreement shall be deemed to waive or prejudice any party's position.

5. Nothing in the terms of this Agreement shall be construed to limit or modify the discretion accorded EPA by the CWA or by general principles of administrative law, including EPA's discretion to alter, amend or revise any regulations, guidance, or interpretations EPA may issue in accordance with this Agreement or to promulgate or issue superseding regulations, guidance, or interpretations, nor shall the terms of this agreement be construed to limit any rights plaintiffs may have to challenge any such actions by EPA. No provision of this Agreement shall be interpreted as or constitute a commitment or requirement that EPA obligate funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341.

6. The Parties agree that each party will bear its own costs, fees, and expenses.

7. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same instrument.

8. The effective date of this Agreement shall be the date by which all Parties have executed this Agreement.

Petroleum Marketers Association  
Of America

By: David H. Gellman

Title: President

DATED: 3-26-2004

Pennsylvania Petroleum Marketers &  
Convenience Store Association

By: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

Palmer Oil Company, Inc.

By: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

THOMAS L. SANSONETTI  
Assistant Attorney General  
United States Department of Justice  
Environment and Natural Resources Division

By: \_\_\_\_\_  
LOIS GODFREY WYE  
Environmental Defense Section  
P.O. Box 23986  
Washington, DC 20026-3986

DATED: \_\_\_\_\_

William Gerald Robertson Enterprises, Inc.

By: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

Bjornson Oil Company, Inc.

By: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

Louisville Tire Center, Inc.

8. The effective date of this Agreement shall be the date by which all Parties have executed this Agreement.

Petroleum Marketers Association  
Of America

By: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

Pennsylvania Petroleum Marketers &  
Convenience Store Association

By: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

Palmer Oil Company, Inc.

By: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

THOMAS L. SANSONETTI  
Assistant Attorney General  
United States Department of Justice  
Environment and Natural Resources Division

By: Lois Godfrey Wye  
LOIS GODFREY WYE  
Environmental Defense Section  
P.O. Box 23986  
Washington, DC 20026-3986

DATED: March 29, 2004

William Gerald Robertson Enterprises, Inc.

By: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

Bjornson Oil Company, Inc.

By: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

Louisville Tire Center, Inc.

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Petroleum Marketers Association  
Of America

By: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

Pennsylvania Petroleum Marketers &  
Convenience Store Association

By: John V. Kulik

Title: EX V.P.

DATED: April 8, 2004

Palmer Oil Company, Inc.

By: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

THOMAS L. SANSONETTI  
Assistant Attorney General  
United States Department of Justice  
Environment and Natural Resources Division

By: \_\_\_\_\_

LOIS GODFREY WYE  
Environmental Defense Section  
P.O. Box 23986  
Washington, DC 20026-3986

DATED: \_\_\_\_\_

William Gerald Robertson Enterprises, Inc.

By: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

Bjornson Oil Company, Inc.

By: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

Louisville Tire Center, Inc.

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Petroleum Marketers Association  
Of America

By: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

Pennsylvania Petroleum Marketers &  
Convenience Store Association

By: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

Palmer Oil Company, Inc.

By: Pat Palmer

Title: President

DATED: 4-2-04

THOMAS L. SANSONETTI  
Assistant Attorney General  
United States Department of Justice  
Environment and Natural Resources Division

By: \_\_\_\_\_

LOIS GODFREY WYE  
Environmental Defense Section  
P.O. Box 23986  
Washington, DC 20026-3986

DATED: \_\_\_\_\_

William Gerald Robertson Enterprises, Inc.

By: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

Bjornson Oil Company, Inc.

By: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

Louisville Tire Center, Inc.

8. The effective date of this Agreement shall be the date by which all Parties have executed this Agreement.

Petroleum Marketers Association  
Of America

By: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

Pennsylvania Petroleum Marketers &  
Convenience Store Association

By: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

Palmer Oil Company, Inc.

By: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

THOMAS L. SANSONETTI  
Assistant Attorney General  
United States Department of Justice  
Environment and Natural Resources Division

By: \_\_\_\_\_

LOIS GODFREY WYE  
Environmental Defense Section  
P.O. Box 23986  
Washington, DC 20026-3986

DATED: \_\_\_\_\_

William Gerald Robertson Enterprises, Inc.

By: William G. Robertson

Title: President

DATED: 4-4-04

Bjornson Oil Company, Inc.

By: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

Louisville Tire Center, Inc.



8. The effective date of this Agreement shall be the date by which all Parties have executed this Agreement.

Petroleum Marketers Association  
Of America

By: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

Pennsylvania Petroleum Marketers &  
Convenience Store Association

By: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

Palmer Oil Company, Inc.

By: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

THOMAS L. SANSONETTI  
Assistant Attorney General  
United States Department of Justice  
Environment and Natural Resources Division

By: \_\_\_\_\_

LOIS GODFREY WYE

Environmental Defense Section

P.O. Box 23986

Washington, DC 20026-3986

DATED: \_\_\_\_\_

William Gerald Robertson Enterprises, Inc.

By: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

Bjornson Oil Company, Inc.

By: Matt Bjornson

Title: Treasurer

DATED: 4-1-04

Louisville Tire Center, Inc.

By: John H. H. Jr  
Title: Pres

DATED: 4/13/04

Acme Fuel Center

By: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

Lanman Oil Co.

By: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

Acme Fuel Center Company

By:  \_\_\_\_\_

Title: THOMAS J. ALLEN  
PRESIDENT

DATED: APRIL 1, 2009

Lanman Oil Co.

By: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

Acme Fuel Center

By: \_\_\_\_\_

Title: \_\_\_\_\_

DATED: \_\_\_\_\_

Lanman Oil Co.

By: Michael Lanman

Title: President

DATED: 4-1-04

**ATTACHMENT A**

*Letter from Assistant Administrator for the Office  
of Solid Waste and Emergency Response to PMAA as follows:*

This letter is in response to your request for the Agency's view regarding whether several approaches under consideration by your members would satisfy 40 CFR §112.7(a)(2)'s "equivalent environmental protection" provision and for clarification of the scope of the requirements in 40 CFR §112.7(h) (entitled "Facility tank car and tank truck loading/unloading rack (excluding offshore facilities)"). We discuss each of your proposals and questions below. Please note that the guidance provided in this letter is based on generalized assumptions and may not be applicable in a particular case based on site-specific circumstances.

**"Equivalent Environmental Protection"**

**Integrity Testing**

The newly amended SPCC provisions regarding bulk storage container integrity require, among other things, that each aboveground container be tested for integrity "on a regular schedule." 40 CFR §112.8(c)(6). These regulations further provide that "you must combine visual inspection with another testing technique such as hydrostatic testing, radiographic testing, ultrasonic testing, acoustic emissions testing, or another system of non-destructive shell testing." As you know, however, the regulations also allow deviations from this requirement where "you provide equivalent environmental protection by some other means of spill prevention, control, or countermeasure." 40 CFR §112.7(a)(2). You have asked whether, for shop-built containers, visual inspection plus certain actions to ensure that the containers are not in contact with the soil would likely be considered to provide "equivalent environmental protection" to visual inspection plus another form of testing.

It is our view that for well-designed shop-built containers with a shell capacity of 30,000 gallons or under, combining appropriate visual inspection with the measures described below would generally provide environmental protection equivalent to that provided by visual inspection plus another form of testing. Specifically, the Agency generally believes that visual inspection plus elevation of a shop-built container in a manner that decreases corrosion potential (as compared to a container in contact with soil)<sup>1/</sup> and makes all sides of the container, including the bottom, visible during inspection (e.g., where the containers are mounted on structural supports, saddles, or some forms of grillage) would be considered "equivalent." In a similar

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<sup>1/</sup>Additionally, we recommend that special attention be paid to the characteristics of the material used for the support structure to ensure that they do not actually accelerate corrosion.

vein, we'd also generally believe an approach that combines visual inspection with placement of a barrier between the container and the ground, designed and operated in a way that ensures that any leaks are immediately detected, to be considered "equivalent." For example, we believe it would generally provide equivalent environmental protection to place a shop-built container on an adequately designed, maintained, and inspected synthetic liner.<sup>2</sup> We believe these approaches would generally provide equivalent environmental protection when used for shop-built containers (which generally have a lower failure potential than field-erected containers), because these approaches generally reduce corrosion potential and ensure detection of any container failure before it becomes significant.

In determining the appropriate SPCC plan requirements for visual inspection of containers managed as described above, we suggest that the professional engineer (PE) begin by consulting appropriate industry standards, such as those listed in Steel Tank Institute Standard SP001 and American Petroleum Institute Standard 653.<sup>3</sup> Similarly, in assessing whether a shop-built container is well designed, the PE may wish to consult industry standards such as Underwriters Laboratory 142 or American Petroleum Institute Standard 650, Appendix J. Where a facility is considering the use of the above approaches for containers that are currently resting on the ground, or have otherwise been managed in a way that presents risks for corrosion or are showing signs of corrosion, we recommend the facility first evaluate the condition of the container in accordance with good engineering practices, including seeking expert advice, where appropriate.

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<sup>2</sup>Note, however, that a facility may not rely solely on measures that are required by other sections of the rule (e.g., secondary containment) to provide "equivalent environmental protection." Otherwise, the deviation provision would allow for approaches that provide a lesser degree of protection overall.

<sup>3</sup>Note that the Agency intends in the near future to develop guidance on appropriate visual inspection of shop-built containers. In that guidance, we intend to address issues such as inspection frequency, scope (e.g., internal and /or external), training and/or qualifications of persons conducting the inspections, and other measures that may be appropriate at a given site (e.g., measures to detect the presence of water in a container). We expect to use the referenced industry standards in developing such guidance.

It is also important to note, however, that depending on site circumstances, the appropriate requirements for visual inspection may exceed those normally conducted in accordance with recognized industry standards.

### Security

The SPCC regulations state that you must "fully fence each facility handling, processing, or storing oil, and lock and/or guard entrance gates when the facility is not in production or is unattended." 40 CFR §112.7(g)(1). You have asked whether two specific sets of circumstances would likely be determined to provide "equivalent environmental protection" to this requirement. The first is where the area of the facility directly involved in the handling, processing and storage of oil is adequately fenced. The second is where the facility is equipped with a "pump house" or "pump shack," which contains, among other appropriate things, a master disconnect switch from which all power to pumps and containers is cut off when the facility is unattended.

With respect to your first scenario, it is our view that, as a general matter, adequately fencing all discrete areas directly involved in the handling, processing and storage of oil would provide equivalent environmental protection to fencing the entire footprint of the facility, since it is potential for harm to this equipment that poses the risk addressed by the fencing requirement.

With respect to the second scenario, the approach you suggest would appear to generally provide environmental protection equivalent to fencing for risks associated with the potential for unauthorized access to pumping equipment. In other words, cutting off power in the manner you suggest would likely provide the added layer of protection offered by a fence should the other security measures offered by the rule, in this case 40 CFR §112.7(g)(3)'s requirements for securing pumps, fail. However, because cutting off power as suggested does not address risks to containers, piping and appurtenances not associated with the pumps at the facility, it does not appear to provide protection equivalent to fencing as it relates to risks to such equipment.

### Conclusion

Please note that determinations of "equivalent environmental protection" must be implemented and documented in accordance with 40 CFR §112.7(a)(2). In addition, please be aware that the conclusions drawn in this letter are only for the purposes of meeting the "environmental equivalence" standard in the SPCC regulation. PE's might nevertheless decide to recommend non-destructive shell testing and fencing of the entire footprint of the facility for reasons other than compliance with the SPCC rule (e.g., to protect an owner's investment in equipment or to meet other local, state or federal requirements).

Finally, this letter is meant to provide guidance on the "equivalent environmental protection" standard. It does not, however, substitute for EPA's statutes or regulations, nor does it itself constitute a regulation. Thus, it cannot impose legally-binding requirements on EPA, States, or the regulated community, and its recommendations may not be appropriate at an individual site based on site-specific circumstances.

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**40 CFR §112.7(h)**

In addition to the above, you have asked the Agency whether having a rack within a facility's boundaries subjects all loading/unloading areas at the facility to 40 CFR §112.7(h)'s tank car and tank truck loading/unloading "rack" requirements. As we have discussed, the Agency does not interpret §112.7(h) to apply beyond activities and/or equipment associated with tank car and tank truck loading/unloading racks. Therefore, loading and unloading activities that take place beyond the rack area would not be subject to the requirements of 40 CFR §112.7(h) (but, of course, would be subject, where applicable, to the general containment requirements of 40 CFR §112.7(c)).

If you have any questions, please contact David Evans of my staff at (703) 603-8885.

[ Signature of Assistant Administrator for the Office  
of Solid Waste and Emergency Response]



ATTACHMENT B

*Federal Register notice to include the following:*

Plaintiffs challenged statements made in the preamble to the SPCC amendments concerning the meaning of “impracticability” under 40 CFR §112.7(d). As you know, that section provides that where secondary containment is “not practicable,” a facility may use a contingency plan instead. The preamble language at issue, which appears at 67 FR 47104 (July 17, 2002), stated the following:

*“We believe that it may be appropriate for an owner or operator to consider costs or economic impacts in determining whether he can meet a specific requirement that falls within the general deviation provision of §112.7(a)(2). We believe so because under this section, the owner or operator will still have to utilize good engineering practices and come up with an alternative that provides “equivalent environmental protection.” However, we believe that the secondary containment requirement in §112.7(d) is an important component in preventing discharges as described in §112.1(b) and is environmentally preferable to a contingency plan prepared under 40 CFR part 109. Thus, we do not believe it is appropriate to allow an owner or operator to consider costs or economic impacts in any determination as to whether he can satisfy the secondary containment requirement. Instead, the owner or operator may only provide a contingency Plan in his SPCC Plan and otherwise comply with §112.7(d). Therefore, the purpose of a determination of impracticability is to examine whether space or other geographic limitations of the facility would accommodate secondary containment; or, if local zoning ordinances or fire prevention standards or safety considerations would not allow secondary containment; or, if installing secondary containment would defeat the overall goal of the regulation to prevent discharges as described in §112.1(b).” [emphasis added].*

The Agency did not intend with the language emphasized above to opine broadly on the role of costs in determinations of impracticability. Instead, the Agency intended to make the narrower point that secondary containment may not be considered impracticable solely because a contingency plan is cheaper. (This was the concern that was presented by the commenter to whom the Agency was responding.) As discussed above, this conclusion is different than that reached with respect to purely economic considerations in determining whether to meet other rule requirements subject to deviation under §112.7(a)(2). Under that section, as stated above, facilities may choose environmentally equivalent approaches (selected in accordance with good engineering practices) for any reason, including because they are cheaper.

In addition, with respect to the emphasized language enumerating considerations for determinations of impracticability, the Agency did not intend to foreclose the consideration of other pertinent factors. In fact, in the response-to-comment document for the SPCC amendments rulemaking, the Agency stated that “. . . for certain facilities, secondary containment may not be

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practicable because of geographic limitations, local zoning ordinances, fire prevention standards, or other good engineering practice reasons." For more examples of situations that may rise to the level of impracticability, see, e.g. 67 FR 47102 (July 17, 2002) and 67 FR 47078 (July 17, 2002) (pertaining to flow and gathering lines).